United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7271

To be argued by
WILLIAM M. BARRON

United States Court of Appeals
FOR THE SECOND CIRCUIT

POLORON PRODUCTS, INC.
(With Substitution Applied for by
DYNAMARK CORPORATION, Assignee),
Plaintiff-Appellant,

against

LYBRAND, ROSS BROS. & MONTGOMERY
(now known as Coopers & Lybrand),
Defendant and Third-Party
Plaintiff-Appellee,

against

POLORON PRODUCTS OF INDIANA, INC., SAMUEL LEVITT,
CARL LEVITT, JAY LEVITT, DYNAMARK CORPORATION
and GEORGE FEIWEL,
Third-Party Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLEE

HUGHES HUBBARD & REED
Attorneys for Defendant-Appellee
One Wall Street
New York, New York 10005
(212) 943-6500

Of Counsel:

POWELL PIERPOINT
WILLIAM M. BARRON

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BRIEF OF DEFENDANT-APPELLEE

Preliminary Statement

This brief is submitted by defendant-appellee Coopers & Lybrand ("Lybrand") in opposition to an appeal from an order of the United States District Court for the Southern District of New York, William C. Conner, *Judge,* dismissing

a damage action brought under Rule 10b-5 by Poloron Products, Inc. ("Poloron"). Judge Conner's opinion, which is not yet officially reported, may be found in the Appendix (228A-240A).*

Issues Presented

1. Whether this appeal must be dismissed, since the only person seeking to prosecute the appeal, Dynamark Corporation, does so solely by virtue of a champertous assignment of the claim dismissed below.

2. Whether the District Court was correct in determining that the action against Lybrand was barred under Fed. R. Civ. P. Rule 41(a)(1), since two prior actions had been brought against Lybrand on the same claim and had been voluntarily dismissed.

3. Whether the amended complaint against Lybrand states a claim for relief under Rule 10b-5 in the absence of any allegation of *scienter*.

Statement of the Case

1. Poloron's 1967 Stock Purchase

On December 1, 1967 Poloron acquired all of the issued and outstanding stock of Levitt Manufacturing Company ("LMC"), a family-owned corporation which manufactured lawnmowers in Indiana. The sellers were Samuel Levitt and his sons Carl and Jay Levitt (the "Levitts").

Lybrand's only role in the transaction was to conduct an audit examination of LMC's balance sheet as of September 30, 1967. (229A.) At the closing on December 1, 1967

* Unless otherwise indicated, all references are to pages of the Appendix.

Lybrand delivered a handwritten draft of the LMC balance sheet, showing that the Company had a deficit net worth in excess of $300,000. (63A-64A, 179A, 190A.) Lybrand did not issue its audit certificate until February 9, 1968, approximately two months later. At the closing, the Levitts warranted the accuracy of the draft balance sheet to Poloron and agreed to indemnify Poloron for any liabilities or claims against LMC not reflected in the balance sheet. (178A-181A, 191A, 199A.)

Poloron proceeded with the closing, and paid the Levitts $11,200 cash for the LMC stock. (182A.) Poloron agreed that if LMC showed a profit in 1968, 1969 or 1970 Poloron would give the Levitts a proportional number of shares of Poloron's own publicly traded common stock. (21A.)

Poloron subsequently discovered facts which it believed showed that LMC had an additional deficit of $220,000 beyond that shown on the September 30, 1967 balance sheet. Pursuant to its rights under the acquisition agreement, Poloron withheld all of the shares of Poloron common stock due the Levitts.* (182A-183A, 204A-205A.) Poloron also caused LMC to withhold sales commissions which were due under a sales representative agreement which LMC had entered into with Dynamark Corporation, a corporation wholly owned and controlled by the Levitts. (182A-183A, 204A-205A.)

2. The Successive Suits Against Lybrand

The First Suit. In May, 1970, the Levitts and Dynamark sued LMC** in the United States District Court for the Northern District of Indiana to recover the sales commissions which had been withheld. In September, 1970, they amended their complaint to add Lybrand as a defendant.

* LMC had become profitable, thereby triggering the stock payment provisions of the acquisition agreement. (183A.)

** After buying the LMC stock, Poloron had changed LMC's name to Poloron Products of Indiana, Inc. For simplicity, the company will be referred to as LMC throughout.

Lybrand retained counsel in Indiana to defend the action, but in November, 1970, upon LMC's motion, the action was transferred to the United States District Court for the Southern District of New York, and Lybrand retained New York counsel. Another amended complaint was then served and filed, realleging the claims against Lybrand and adding Poloron as a defendant. The Levitts demanded that Poloron deliver the shares of Poloron common stock which had been withheld. (230A.)

Soon thereafter, Poloron, the Levitts and Dynamark entered into a secret agreement pursuant to which the pending claim against Lybrand was assigned to Poloron. (160A, 230A.) The agreement provided (1) that Poloron would retain the Levitts' attorney, George Feiwell, to prosecute the claim against Lybrand, (2) that the Levitts' corporation, Dynamark, would pay 75% of Poloron's litigation costs, (3) that 75% of any recovery would belong to Dynamark, (4) that Dynamark would pay 75% of any judgment Lybrand might obtain against Poloron by way of counterclaim, and (5) that the claim against Lybrand would be assigned back to Dynamark on demand. (185A-188A.) This agreement was not disclosed to Lybrand. Instead, it was represented to Lybrand that the parties had reached a settlement and wished to terminate the litigation. A stipulation of dismissal was tendered to Lybrand and was executed. (183A-184A, 193A-194A, 230A.)

The Second Suit. Pursuant to the agreement, the Levitts' attorney thereafter filed a complaint in Poloron's name against Lybrand in the United States District Court for the Northern District of Illinois, containing allegations similar to those in the first action. (231A.) Lybrand retained attorneys in Chicago, obtained an extension of time to answer, and prepared to defend the action. Before Lybrand had answered the complaint, Poloron filed a notice of dismissal pursuant to Fed. R. Civ. P. Rule 41(a)(1)(i). (184A, 231A.)

The Third Suit. Shortly thereafter, Poloron commenced a third action against Lybrand, this time in the United States District Court for the Southern District of New York. It is this action which is the subject of this appeal.

Lybrand answered Poloron's complaint, as amended, and interposed two counterclaims. The first counterclaim alleged the malicious prosecution of successive suits against Lybrand on the same claim. The other sought $4,830 due from Poloron on account of professional services rendered. (58A-61A, 231A.)

3. The Decision Below

Lybrand moved to dismiss the amended complaint, asserting as separate grounds for dismissal: (a) that the action was barred by the "two-dismissal" rule of Fed. R. Civ. P. Rule 41(a)(1); and (b) that the amended complaint failed to state a claim under Rule 10b-5 upon which relief could be granted.

On April 3, 1975 the District Court dismissed the amended complaint upon the ground that the action was barred by the two-dismissal rule, which provides that a notice of dismissal operates as an adjudication on the merits "when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim". Fed. R. Civ. P. Rule 41(a)(1). It was undisputed that the first and second actions against Lybrand had been "based on or including the same claim" and that the second action had been voluntarily terminated by a notice of dismissal. (233A.) Although Poloron contended that the two-dismissal bar should not apply since both dismissals had not been by notice, the Court pointed out that under Rule 41(a)(1) it is only the second dismissal whose nature is critical. (234A-236A.) Although the assignment of Dynamark's claim to Poloron had resulted in a different plaintiff bring-

ing the second action, the District Court concluded that the two-dismissal rule could not be circumvented by a mere change in nominal parties. (236A-237A.)

4. Poloron's Agreement with Lybrand

Soon after the District Court's decision, Poloron and Lybrand entered into settlement discussions and reached an agreement. Poloron released the alleged claim against Lybrand and paid Lybrand $9,830 to surrender its two counterclaims. However, because of its 1971 agreement with the Levitts and Dynamark, Poloron was concerned that Dynamark might demand an assignment of the claim against Lybrand so that Dynamark could appeal from the order dismissing the third suit and, if successful, undertake once again to prosecute the claim itself. Lybrand informed Poloron of its belief that an assignment of the claim to Dynamark Corporation would be champertous and invalid, but stipulated that the release given to Lybrand would not include the claim set forth in Poloron's amended complaint *if* that claim were *validly* assigned to Dynamark Corporation. (247A-248A.)

5. The Assignment to Dynamark Corporation

Poloron soon informed Lybrand that Dynamark had demanded an assignment but had also indicated that there might not be time for it to seek substitution as plaintiff in the District Court before the time to appeal expired on May 5, 1975. Lybrand stipulated that if Dynamark received an attempted assignment, it could notice the appeal in Poloron's name and make its motion for substitution in the Court of Appeals. (252A.)

On May 2, 1975 Dynamark's counsel filed a notice of appeal in Poloron's name. (241A.) The assignment to Dynamark, however, did not occur until May 27, 1975. (251A.)

6. Lybrand's Motion to Dismiss the Appeal

On May 29, 1975, Lybrand served and filed a motion to dismiss the appeal upon the ground that the assignment to Dynamark Corporation was invalid and that since Poloron had no interest in the appeal, the cause was moot. On June 4, 1975 Dynamark cross-moved for an order substituting itself as plaintiff-appellant. When the motions came on for hearing on June 10, 1975, the Court referred them to the panel which will hear the appeal.

Argument

This appeal should be dismissed since there is no issue properly before this Court. The plaintiff below has no interest in this appeal, and the prosecution of this proceeding by Dynamark Corporation arises solely from an invalid and champertous assignment to it of the claim dismissed by the District Court.

If the merits of the appeal be considered, the order dismissing the amended complaint should be affirmed, since the District Court properly determined that the action was barred under the two-dismissal rule of Fed. R. Civ. P. Rule 41(a)(1).

The order dismissing the amended complaint may also be affirmed upon another ground advanced by Lybrand but not reached by the District Court, *i.e.*, that the amended complaint fails to state a claim under Rule 10b-5 upon which relief can be granted.

I.

THERE IS NO ISSUE PROPERLY BEFORE THIS COURT BECAUSE THE ASSIGNMENT TO DYNAMARK CORPORATION IS CHAMPERTOUS AND INVALID

Section 489 of the New York Judiciary Law (McKinney 1968) specifically prohibits a corporation from taking an

assignment of a claim for the purpose of suing thereon. The statute provides in pertinent part as follows:

> "[N]o corporation or association, directly or indirectly, itself or by or through its officers, agents or employees, shall solicit, buy or take an assignment of * * * a * * * thing in action, or any claim or demand, with the intent and for the purpose of bringing an action or proceeding thereon; * * *."

The New York champerty statute is "intended to aid in the enforcement of time-honored public policies." *Transbel Inv. Co.* v. *Roth,* 36 F. Supp. 396, 398 (S.D.N.Y. 1940). As stated in *Lee* v. *Community Capital Corp.,* 67 Misc. 2d 699, 324 N.Y.S.2d 583 (Sup. Ct. 1971):

> "Section 489 of the Judiciary Law is penal in nature, and manifests this State's public policy prohibiting such practices, and hence classifies all such transactions as void aside from the penal sanctions imposed. * * * [T]his court will not lend its aid or grant relief to a party whose cause of action is predicated on such an act or transaction." 67 Misc. 2d at 701, 324 N.Y.S.2d at 585.

In *Fairchild Hiller Corp.* v. *McDonnell Douglas Corp.,* 28 N.Y.2d 325, 270 N.E.2d 691, 321 N.Y.S.2d 857 (1971) the New York Court of Appeals described the public policy reflected in the New York statute:

> "* * * The legislative concern is clear. To prevent the resulting strife, discord and harassment which could result from permitting attorneys and corporations to purchase claims for the purpose of bringing actions thereon, the Legislature enacted sections 274 and 275 of the former Penal Law (the predecessor statutes to § 488 and § 489) declaring the practice of champerty and maintenance to be illegal." 28 N.Y.2d at 329, 270 N.E.2d at 693, 321 N.Y.S.2d at 860.

In the litigation at hand, the dispute between Poloron and Lybrand was resolved by the District Court after

extended litigation involving three separate lawsuits on the same claim. Poloron decided not to appeal from the dismissal of its amended complaint in the third action, so peace presumably should reign. Dynamark, however, commenced this appellate proceeding in Poloron's name and purchased an assignment of the purported claim against Lybrand so that it could undertake to prosecute the amended complaint itself. This assignment is champertous and is clearly proscribed by the New York Judiciary Law.

In *American Optical Co.* v. *Curtiss,* 56 F.R.D. 26 (S.D.N.Y. 1971), the court undertook a thorough review of the cases interpreting the New York champerty statute. American Optical Company had brought suit to obtain patents which the defendants had developed in the course of research at the University of Michigan. Although the University's bylaws provided that such patents belonged to it, the University did not wish to press its claim. American Optical, on the other hand, wished to utilize the patents (which had been exclusively licensed to a competitor) and obtained an assignment of the University's claim so that it could sue. The Court stated:

> "* * * The University, not wishing to sue to enforce its rights, executed an assignment to A.O. so that it would sue in place of the University. The very substance and purpose of the Agreement was to permit A.O. to bring suit. This seems to be the very situation prohibited by Section 275 of the Penal Law." 56 F.R.D. at 32

The Court found the assignment invalid:

> "There is no indication that the prevailing social and moral attitudes of the New York community have changed so as to countenance assignments to a corporation which are expressly contrived so as to enable the corporation to sue on the basis of the assigned rights * * *. Therefore, under New York

> Law, the Agreement would be considered to be immoral and contrary to public policy * * *." 56 F.R.D. at 31-32.

Like the University in *American Optical Co.* v. *Curtiss*, Poloron decided not to pursue the claim against Lybrand in its amended complaint. Dynamark has purchased an assignment of that claim, and the very substance and purpose of that assignment is to permit it to sue Lybrand.

The test under the statute is whether Dynamark took the assignment with the intent and purpose of prosecuting the assigned claim. *See Fairchild Hiller Corp.* v. *McDonnell Douglas Corp., supra; Sprung* v. *Jaffe*, 3 N.Y.2d 539, 147 N.E.2d 6, 169 N.Y.S.2d 456 (1957); *Puro* v. *Puro*, 31 App. Div. 2d 837, 298 N.Y.S.2d 111 (1969); *Roslyn Savings Bank* v. *Jones*, 69 Misc.2d 733, 330 N.Y.S.2d 954 (Sup. Ct. 1972). Dynamark does not dispute that it purchased the claim so that it could sue Lybrand, but contends that this was not its sole purpose. In an affidavit filed in opposition to Lybrand's motion to dismiss the appeal, Dynamark's counsel states: "the assignment to Dynamark was designed primarily to protect the right of Dynamark to prosecute this appeal and, if successful, to recover damages for the injury caused to it" by Lybrand. (Affidavit of Martin R. Gold, sworn to June 4, 1975, p. 10.) In its brief on appeal, Dynamark similarly states that the purpose of the assignment was "to protect the original claim against Lybrand arising out of its misconduct which had damaged Dynamark as well as Poloron." (Dynamark's brief on appeal, p. 21.) It is obvious, however, that Dynamark in fact has no right whatsoever to prosecute this appeal or to proceed on the claim against Lybrand but for its recent purchase of the claim from Poloron. In truth, the assignment is a contrivance whereby the Levitts, through Dynamark, seek to *acquire* the right to appeal as well as to prosecute the claim against Lybrand.

Dynamark's sole argument in support of the assignment's validity appears to be that the claim being assigned to it is the same claim which was assigned to Poloron in 1971. Lybrand has already been sued three times on that claim, first by the Levitts and Dynamark, then twice in succession by Poloron. Lybrand is thus in effect now threatened with a fourth suit, again by Dynamark. The argument that the assignment to Dynamark is valid is without merit, since section 489 of the New York Judiciary Law applies to the assignment of "*any* claim or demand." The statute is intended to prevent harassment. Its operation hinges on the purpose of the assignee, not the nature of the claim being assigned. Dynamark therefore confuses proof of its purpose, which is necessary under the statute, with proof of the nature of the claim, which is irrevelant. There is no reason to believe that the statute does not apply simply because the assigned claim may have once belonged to the assignee. *Cf. Puro* v. *Puro, supra.*

II.

THE DISTRICT COURT CORRECTLY DETERMINED THAT THE ACTION AGAINST LYBRAND IS BARRED BY THE TWO-DISMISSAL RULE OF RULE 41(a)(1)

Rule 41(a)(1) of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> "(a) VOLUNTARY DISMISSAL: EFFECT THEREOF.
>
> "(1) * * * [A]n action may be dismissed by the plaintiff without an order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all

> parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that *a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.*" (Emphasis added.)

Thus, a plaintiff may voluntarily dismiss an action either by filing a notice of dismissal (if an answer or motion for summary judgment has not been served) or by filing a stipulation of all parties. However, if he files a notice of dismissal in a second action "based on or including the same claim", the notice of dismissal operates as an adjudication upon the merits. The District Court found that the most recent action against Lybrand was barred by this "two-dismissal rule", and dismissed Poloron's amended complaint.

There is no dispute that the first and second actions against Lybrand were "based on or including the same claim" (233A), and there is no dispute that the second action was terminated by a notice of dismissal (233A). Dynamark argues for reversal, however, on the grounds (1) that the notice of dismissal in the second action did not come within the terms of the two-dismissal bar because the first action was dismissed by filing a stipulation of dismissal, and (2) that because Poloron, not Dynamark, was the named plaintiff in the second action against Lybrand, the dismissal of that action was not by "a plaintiff who has once dismissed." Both arguments were rejected by the District Court and should also be rejected by this Court.

The first contention, that both dismissals must be by notice, is contrary to the clear language of Rule 41(a)(1), which requires only that the *second* dismissal be by notice.

As the District Court pointed out, the Rule "makes no distinction as to how the prior dismissal was effected, so long as the plaintiff was responsible for it" (234A). Although Dynamark urges that the stipulation dismissing the first action constituted a dismissal "by all of the parties," the Rule and the commentators leave no doubt that the filing of a stipulation under Rule 41(a)(1)(ii), no less than the filing of a notice under Rule 41(a)(1)(i), is a dismissal "*by the plaintiff*." *See* 5 J. MOORE, FEDERAL PRACTICE ¶41.04, at 1048 n. 17 (2d ed. 1974); 9 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, CIVIL § 2363, at 151 n. 14 (1971). It has even been suggested that the two-dismissal rule applies when the first dismissal is obtained at the plaintiff's instance by court order under Rule 41(a)(2). 4 Fed. Rules Serv. 927, 928 (1941).

Indeed, Rule 41(a)(1) provides that the first dismissal may take place in a *state* court. *See Rader* v. *Baltimore & O. R. Co.*, 108 F.2d 980, 986 (7th Cir.), *cert. denied*, 309 U.S. 682 (1940). It is therefore quite possible that the first dismissal will occur under a procedure which is unavailable in the federal courts. Since the draftsmen of Rule 41(a)(1) had no way to predict how a plaintiff might obtain dismissal under state practice, they surely would have specified the nature of the first dismissal if they had intended to limit the two-dismissal rule as proposed by Dynamark.

Dynamark's other argument is that there have not been two dismissals for purposes of Rule 41(a)(1) because it was not the plaintiff in the second action. Dynamark, having now re-acquired its purported claim against Lybrand, thus urges that its dismissal of the first action and its former assignee's dismissal of the second action should not add up to two dismissals for purposes of Rule 41(a)(1). The District Court rejected this contention, pointing out that despite the assignment to Poloron, Dynamark had remained the only party with a substantial interest in the

litigation. (236A-237A.) Not only was Dynamark entitled to 75% of any recovery on the claim, but it retained control as to the attorney who would be employed by Poloron (185A), agreed to pay 75% of Poloron's litigation costs (185A-186A) and retained the right to repurchase the claim at will (187A). Indeed, it was the Levitts' and Dynamark's own attorney who represented Poloron in the second action and filed the notice of dismissal. (160A, 173A.) The District Court concluded that the two-dismissal rule could not be defeated by such a change in nominal parties without a change in beneficial interest. The District Court quoted with approval the decision in *Robertshaw-Fulton Controls Co. v. Noma Electric Corp.*, 10 F.R.D. 32, 35 (D. Md. 1950), in which the two-dismissal rule was applied despite a change in nominal defendants:

> "* * *It is precisely the pursuit of such duplicative, wasteful and harassing litigation * * * that the 'two-dismissal' Rule aims to discourage and prevent." (237A.)

A contrary decision in the present case would virtually abrogate the two-dismissal rule, since it would permit unlimited voluntary dismissals so long as each new suit was preceded by an assignment of the claim to a different nominal plaintiff.

Similarly, the two-dismissal rule should apply where the plaintiff in the second action is "in privity" with the plaintiff in the first. *See* 5 J. Moore, Federal Practice ¶41.04, at 1046 n. 12 (2d ed. 1974). The Levitts and Dynamark were clearly in privity with Poloron when the second action was brought since Poloron had obtained an assignment of their purported claim against Lybrand, retained their attorney, and executed a detailed agreement with Dynamark regarding litigation costs, Dynamark's right to proceeds and other matters. (185A-188A.)

Failure to apply the two-dismissal rule in the present circumstances would ignore not only its terms, but

also its purpose, which is to prevent abuse of dismissal procedures. Lybrand was sued by the Levitts and Dynamark in the first action on a claim which was contingent on the outcome of their dispute with Poloron. In June, 1971, however, Lybrand was told that they had reached a settlement and wished to terminate the litigation. (183A-184A, 193A-194A.) Lybrand's counsel was asked to execute a stipulation of dismissal, and gladly did so. It subsequently came to light that nothing had been "settled" and that there had been no intention whatsoever of terminating litigation. The claim against Lybrand had simply been assigned to Poloron and Poloron had promised to sue Lybrand again as soon as the first action was dismissed. Dynamark has yet to offer any legitimate explanation for this first assignment or the dismissal of the action in which the claim was pending. Whatever the motive behind these actions, the deception employed to obtain Lybrand's consent to the dismissal of the first action, together with the commencement and unilateral dismissal of the second action and the bringing of yet a third, constitute the kind of harassment and abuse of dismissal procedures which Rule 41 was designed to prevent.

III.

THE DISTRICT COURT'S ORDER OF DISMISSAL MAY BE AFFIRMED UPON A GROUND ADVANCED BY LYBRAND BUT NOT REACHED BY THE DISTRICT COURT, TO WIT: THE AMENDED COMPLAINT DOES NOT STATE A CLAIM FOR RELIEF UNDER RULE 10b-5

The amended complaint dismissed by the District Court purports to allege a violation by Lybrand of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder. However, one of the basic elements of a claim

under the 1934 Act and Rule 10b-5 is scienter. In *Shemtob* v. *Shearson, Hammill & Co.,* 448 F.2d 442, 445 (2d Cir. 1971) and *Lanza* v. *Drexel & Co.,* 479 F.2d 1277, 1304-1305 (2d Cir. 1973) (en banc), this Court stated that no violation of Rule 10b-5 can be shown:

> "* * * in the absence of allegation of facts amounting to *scienter,* intent to defraud, reckless disregard for the truth, or knowing use of a device, scheme or artifice to defraud."

Under the test, a plaintiff may not rely upon allegations of negligence, but must either show that the defendant had actual knowledge of misrepresentations or omissions, or that the defendant's failure to discover misrepresentations and omissions amounted to a willful, deliberate or reckless disregard for the truth that is the equivalent of knowledge. *Lanza* v. *Drexel & Co., supra,* 479 F.2d at 1305.

In the present action, one searches the amended complaint in vain for such allegations. The amended complaint (3A-9A) alleges only neutral facts, *i.e.,* that at the closing Lybrand presented a balance sheet which it said would partially certify (amended complaint, ¶ 11), that the balance sheet was relied upon (amended complaint, ¶ 13) and that the balance sheet was false (amended complaint, ¶ 14). There is no allegation that Lybrand knew or had reason to know that the balance sheet was faulty. There is no averment which would even support a finding of common law negligence, let alone gross negligence or fraud.

The action dismissed by the District Court was not only the third lawsuit against Lybrand, but the amended complaint was the fifth against Lybrand on the same purported cause of action. It fails to state a claim upon which relief can be granted and should be dismissed.

Conclusion

For the foregoing reasons, the appeal should be dismissed or, in the alternative, the order appealed from should be affirmed.

In addition, pursuant to Fed. R. App. P. Rule 38, appellee should be awarded just damages, including its attorneys' fees, and double costs.

Dated: New York, New York
July 17, 1975

Respectfully submitted,

HUGHES HUBBARD & REED
Attorneys for Defendant-Appellee
One Wall Street
New York, New York 10005
(212) 943-6500

Of Counsel:

POWELL PIERPOINT
WILLIAM M. BARRON

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